



# THE LEGAL EAGLE

## **HOW TO FIND A MILITARY DIVORCE ATTORNEY**

*INTRODUCTION: This handout aims to provide you with information about selecting a lawyer for your military divorce case. It is, of course, very general in nature since no handout can answer each of your individual questions. Please read over the text carefully in connection with your visit to our office so that you may have the most information available to help you with your family law problem. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

### **INTRODUCTION: WHY A SPECIAL ATTORNEY FOR MILITARY DIVORCE?**

The subject of military pension division, including the allocation of payments under the Survivor Benefit Plan, is complex and often illogical. The rules are difficult to understand, hard to find and sometimes make no sense. John Camp, an attorney in Warner Robins, GA, makes the point: "Where does the skill of an experienced military divorce attorney really become important? Any attorney can divide a military pension using a percentage, fraction or fixed dollar amount. It is knowing what benefits exist for the military retiree, how to divide them in an equitable manner, and how to protect the former spouse *after* the divorce that separates just *any* lawyer from a "military divorce lawyer."

You cannot rely on just a divorce lawyer to help you through this morass; you need someone who specializes in this area of the law. This can be a former JAG officer, a retired military lawyer, a Reservist or National Guard attorney, or a legal assistance attorney at a military base. Often the best arrangement is to hire a lawyer to handle most of the family law issues, and then retain a specialist in military divorce (whether in-state or elsewhere) to advise on those limited aspects of the case.

To find out whether you're hiring the right lawyer in the area of military divorce, we've prepared a list of "interview questions" (with answers following the \* below the question). Try out some of these on the attorney whom you're consulting about handling your case, and see how he or she performs. You can slip them in during the interview as casual questions, or you can inform the attorney that you have several interview questions which you'd like to ask to see if he or she is the right lawyer for your case. An honest and competent lawyer should have no problem in agreeing to a "test drive" on this difficult subject, and you'll usually figure out after four or five questions whether the lawyer is knowledgeable.

Note that this is not intended to be a complete question-and-answer guide for those going through a military divorce. There are other Legal Eagle handouts which address in more detail the kinds of problems and issues presented in brief form here.

### **QUESTIONS TO ASK**

#### **SECTION 1. For anyone... servicemember, retiree, spouse or former spouse -**

##### ***What office sends out the checks for pension division?***

\*This is the Cleveland office of DFAS, the Defense Finance and Accounting Service (except in the case of retired pay for members of the Coast Guard, Public Health Service and the National Oceanographic and Atmospheric Administration).

##### ***What is the website for DFAS?***

\*It's [www.dfas.mil](http://www.dfas.mil) – changed in the spring of 2007 from [www.dod.mil/dfas](http://www.dod.mil/dfas).

##### ***How soon after getting a court order will the pay center send out the first pension division check?***

\*The pay center will take up to 90 days to process the pension division order. This means 90 days after receipt of the pension division order or the divorce decree which divides the pension, or after the retiree begins receipt

of the pension payments, whichever is later. Awareness of this three-month gap is important, since it should be addressed in the order or decree.

***How long must you be married to get military pension division?***

*\*A trick question – there is NO length of marriage necessary for division of the military pension. One day can provide a small pension benefit to be divided. One year can give a somewhat larger benefit – enough, perhaps, to keep the other spouse in beer and nachos each month. Five years can be the equivalent of a sum of payments that is over \$50,000. The benefits acquired during these periods are divisible in most state courts.*

***What is CRDP?***

*\*It's Concurrent Retirement and Disability Pay. This is the return of military retired pay, for those with a VA disability rating of 50% or more, which was waived for disability compensation. It is returned gradually over the period 2004-2014, except for those with 100% disability ratings, who are immediately entitled to disability compensation AND military retired pay.*

***What is CRSC?***

*\*This stands for Combat-Related Special Compensation, which is additional money paid to a retiree who has suffered injuries or conditions related to combat or combat training. This benefit is NOT divisible with a former spouse.*

***What is the name of the federal law that tells HOW to divide military pensions?***

*\*Another trick question – there is NO federal statute which states how to divide military retirement benefits. The law which allows pension division in military cases is the Uniformed Services Former Spouses' Protection Act (FSPA), found at 10 U.S. Code Section 1408, but it does not tell how to divide a pension. It only allows the division of military pensions by state courts, leaving the rules up to each state.*

***How does FSPA say that SBP is to be divided?***

*\*There is nothing in FSPA about the Survivor Benefit Plan (SBP), which is an annuity for the former spouse. FSPA is located at 10 U.S. Code Section 1408. The Survivor Benefit Plan is in an entirely different statute, 10 U.S. Code Section 1447 and following sections, and these say nothing about how SBP is to be divided.*

***How much does SBP cost?***

*\*Depends on the benefit requested; for the most common benefit – spouse or former spouse coverage, SBP costs 6.5% of the selected base amount for active-duty personnel.*

***When do you start paying for SBP?***

*\*The SBP premium is paid out of retired pay.*

***Who pays for SBP?***

*\*Since SBP premiums are deducted "off the top" from gross retired pay, the retiree and the former spouse wind up sharing the payments in the same proportion as they share the underlying pension.*

***What is the SBP benefit?***

*\*The SBP benefit is 55% of the selected base amount, which can be anything from \$300 a month up to the full retired pay of the servicemember.*

***Is it possible to have my spouse pay the entire cost of SBP?***

*\*You cannot order DFAS to shift the premium to the other spouse, but a change in the percentage or amount granted by court order for pension division can, in effect, shift the premium costs to the other party.*

***Is SBP a good deal?***

*\*Depends. There are numerous advantages and disadvantages. It's always a good idea to check with a life insurance agent to see if there is life insurance which provides a similar benefit and costs less.*

***Can you get DFAS to pre-approve a QDRO for military pension division?***

*\*No- DFAS doesn't do pre-approvals. AND it's not called a QDRO! A Qualified Domestic Relations Order is used to divide a private company pension. It's a major sign of ignorance to call the order dividing military retired pay "a QDRO."*

***Where will I find the rules for military pension division?***

\*The rules for most branches of service are found in the Department of Defense Financial Management Regulations, or DoDFMR. An acceptable answer would also be: "Attorney Instructions" for military pension division, found at the DFAS website, or "32 CFR part 63," which refers to a 1995 proposed regulation that was never adopted but is still used by DFAS in interpreting and applying the law.

***Is there a guide to help you write up the pension division language?***

\*Yes. See the two books below. In addition, DFAS has an attorney guide at its website on how to draft clauses for military pension division.

***What are the books you would consult in handling my military pension division case?***

\**Military Retirement Benefits in Divorce*, by Marshal Willick (Am. Bar Assn. 1998), and *The Military Divorce Handbook*, by Mark E. Sullivan (Am. Bar Assn. 2006).

***Do you ever associate co-counsel?***

\*You'd better hope so, if the going gets rough. With the exception of a couple dozen truly qualified military divorce attorneys, most of your lawyer-interviewees should acknowledge that they do associate co-counsel. The rules of professional conduct in all states require that a lawyer associate competent co-counsel when he or she does not have the expertise necessary to handle the problem.

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**SECTION 2. For the spouse or former spouse -**

***How long must you be married to get medical benefits?***

\*For full medical benefits, you must be married at least 20 years, the other party must have served at least 20 years in the military, and there must be an overlap of at least 20 years between these two. Such coverage is usually called "20-20-20" coverage. It is critical for long-term marriages for the lawyer to understand this so as to avoid getting a divorce "too early."

***Am I entitled to a share of my spouse's retired pay?***

\*There is no federal entitlement. FSPA says that it's up to the states to decide whether to divide military pensions or not.

***What effect does VA compensation have on pension division?***

\*Receipt of VA disability compensation by a retiree generally requires a reduction of military disability pay. For those with a disability rating of less than 50%, there is a dollar-for-dollar reduction. It is less for those with 50%-90% disability ratings. For those with 100% disability ratings, the Department of Veterans Affairs pays full benefits while DFAS pays the full military pension.

***Is there any way I can lose the SBP benefit?***

\*If you remarry before age 55, you lose SBP eligibility. It is restored if that marriage is annulled or ends in divorce or death. You can also lose it if your divorce decree doesn't continue coverage for you as a former spouse.

***Can the court here divide my former spouse's military pension?***

\*The federal rules for jurisdiction over pension division lay out three tests. If any one of them is met, the court will have the power to divide the pension. First test – is the other party domiciled in the state where the court is located? Second – did the other party consent to the court's jurisdiction to hear the pension case? And third test – does the other party live in the state where the court is located, but not due to military assignment? These three jurisdictional rules should be memorized by the lawyer! They are essential elements in getting pension division.

***What do I need for the court to order a garnishment of the pension?***

\*If the parties were married at least 10 years during creditable military service, and this is shown in the court order or decree, or in the papers submitted with it, then the pay center will allow the garnishment of military retired pay.

***What are the deadlines for sending an SBP order to DFAS?***

\*One year from the divorce, if the order is sent by the servicemember or retiree; one year from the date of the order granting SBP coverage – which might be a different decree, different date – if sent by the spouse or former spouse as a “deemed election.”

***What about SGLI or VGLI for death benefits instead of SBP?***

\*They’re worthless. You cannot enforce a court order or agreement providing for these types of insurance for a spouse, former spouse or child. A 1981 U.S. Supreme Court decision, *Ridgway v. Ridgway*, states that it’s always up to the servicemember or retiree to choose an SGLI beneficiary, and no state court or agreement will be upheld which provide anything else.

***What does FSPA say about life insurance?***

\*Nothing.

\* \* \*

**SECTION 3. For the servicemember or retiree -**

***Can the court here divide my military pension?***

\*See answer set out in Section 2.

***Can I save part of my SBP for my new spouse?***

\*Sorry, Charlie – no deal. SBP is a unitary benefit. It cannot be split between spouses. You can, however, save the whole thing for your future spouse if it’s not allocated in your divorce to your former spouse.

***Can I object and stop military pension division?***

\*The general rule is that, if the lawsuit is in your state of legal residence or “domicile,” you cannot object; this state always has jurisdiction over the division of your pension. The same result probably applies if you’re sued in a state where you’re living but not due to military orders; there’s nothing in federal law which says your objection matters. If you are sued in any other state, you should definitely object since FSPA allows your pension to be divided in a state court *where you consent to the division*.

***Does the non-military spouse get half of the pension?***

\*As a general rule, this happens only if the marriage was for the entire military career. Otherwise, the spouse or former spouse gets half of the marital share (that is, the share acquired during the marriage) or half of the community portion, in community property states.

***What are the deadlines for getting a military pension division order sent to DFAS?***

\*Another trick question. Unlike with SBP, there are NO deadlines for sending a military pension division order to the pay center.

***What about SGLI or VGLI for death benefits instead of SBP?***

\*See answer in Section 2.

***What does FSPA say about life insurance?***

\*Nothing.

***What are the four methods for military pension division allowed by DFAS?***

\*These are:

>Percentage – “Mary gets 34% of John’s disposable retired pay.” [Used when John is already retired]

>Set dollar amount – “Mary gets \$450 a month from John’s military pension.”

>Formula – “Mary gets half of the marital share of John’s retired pay, consisting of 120 months of military service during their marriage divided by the total number of months of John’s creditable military service.” [Used when John is still serving]

>Hypothetical – “Mary gets 41.23% of the retired pay of a sergeant first class (E-7) with 22 years of creditable service.”

***Would a “set dollar amount” for military pension division be a good idea in my case?***

\*Probably so, since it would freeze the amount to your spouse or former spouse, with all COLA’s (cost-of-living adjustments) going to you.

***Can I stop this case dead in the water for a while, since my military duties are keeping me too busy to pay attention to the case?***

\*It's possible if you use the Servicemembers Civil Relief Act (called "The Soldiers' and Sailors' Civil Relief Act" until December 2003). This federal law allows the delay of a civil case or administrative hearing for 90 days or longer if certain conditions in the statute are met.

**RESOURCES**

The inspiration for this Legal Eagle came from three excellent articles that Ed Schilling wrote:  
"Common Mistakes" - <http://www.divorcenet.com/states/nationwide/milart-05>

How to Select an Attorney for Military Divorce -  
<http://www.divorcenet.com/states/nationwide/milart-01>

"You Have a Right to a Competent Attorney" -  
[http://www.divorcenet.com/states/nationwide/you\\_have\\_a\\_right\\_to\\_a\\_competent\\_attorney](http://www.divorcenet.com/states/nationwide/you_have_a_right_to_a_competent_attorney)

Ed is a retired Air Force JAG officer from Aurora, CO. He is often called in trials and pre-judgment negotiations involving military pension division.

**Q. IF I HAVE OTHER QUESTIONS, WHAT SHOULD I DO?**

**A.** See a military legal assistance attorney or private attorney as soon as possible. Your lawyer can answer many questions and help you to make a fair and intelligent decision about your choices, options and alternatives.

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